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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A. D. 1944

**No. 228**

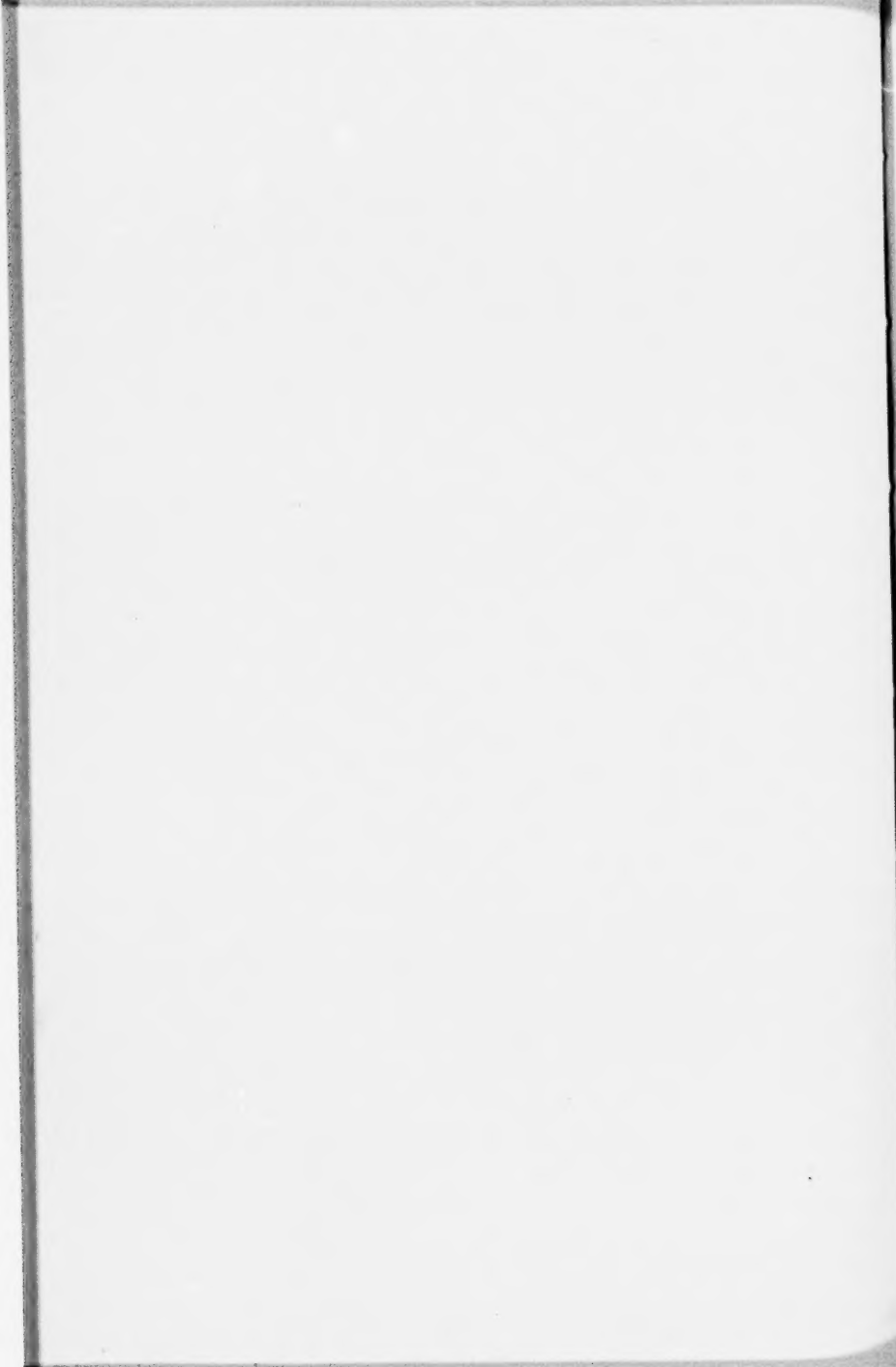
SUN LIFE ASSURANCE COMPANY OF CANADA,  
*Petitioner,*  
*vs.*

RUTH P. BULL,  
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI.**

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*To the Honorable Chief Justice and the Associate Justices  
of the Supreme Court of the United States:*

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Respondent urges that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

**Jurisdiction.**

We concede the jurisdiction of this Court under the Certiorari Act to consider a petition for Writ of Certiorari.



### **Exercise of Jurisdiction.**

(1) But we contend that the case at bar presents no circumstances which warrant the grant of certiorari in this cause since the petition shows that the petitioner is seeking "another hearing." (*Magnum Import Co. v. Coty*, 262 U. S. 159; 43 S. Ct. 531).

(2) The petition in instant case does not present a question for review on writ of certiorari as defined by Rule 38, 5(a), (b), (c).

(3) The discretion vested in this court to review the decisions of the Circuit Court of Appeals by certiorari will only be exercised in matters of gravity and general importance, and instant case is not of a character to call for the exercise of such discretion. *In Re: Woods*, 143 U. S. 202, 12 S. Ct. 417.

(4) The fact that many insurance companies may be interested in obtaining a favorable construction of the aviation clause in instant case does not make the question one of gravity and general public importance.

### **Reasons Urged in Petition for Writ of Certiorari to Review the Judgment of the Circuit Court of Appeals in Favor of Respondent.**

Petitioner, at pages 3 and 4, states the following reasons relied upon for allowance of the writ:

(1) "The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local (Florida) law without citing or distinguishing the local decisions, and in a way probably in conflict with them."

(2) "The decision of the Circuit Court of Appeals for the Seventh Circuit is probably untenable and, therefor, probably in conflict with the Florida law, as yet unannounced by the highest court of that State."

**Answer of Respondent to Petition and Reasons Relied  
Upon for Denial of Writ of Certiorari.**

1. Petitioner admits at page 13 of its brief that there is no Florida decision construing the aviation clause contained in the insurance contract here involved, or one passing upon the facts involved in this case.

The decisions of the Supreme Court of Florida stating the rules governing the construction of insurance contracts do not conflict with the decision of the Circuit Court of Appeals rendered in this case, but on the contrary support it.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit is not untenable and is not in conflict with the Florida law, but on the contrary is in accord with the law of Florida and is also in accord with the general law.

3. The death of Richard Bull resulted from warfare and not from aviation.

4. Petitioner joined issue in the District Court upon a question of fact, and that question was decided by the jury, the trial judge and the Circuit Court of Appeals against petitioner, and it is now bound thereby.

5. The policy was issued to Richard Bull while he was an aviation cadet at a time when war was raging in Europe and the United States was making preparation to expend its national defense program, and the policy contained an aviation clause, but did not contain a war clause. The true intent of the petitioner was to include all risks in war.

6. Where an insurance company defends on the ground that death was due to a cause excepted by the policy, it has the burden of proof to establish that fact.

7. Under the decisions of the Florida Courts the incontestability clause precludes a defense for any reason not expressly excluded by the clause itself.

8. The question of whether or not the death of Bull was due to a cause for which petitioner was liable under the policy is for the jury, even though there is no conflict in the testimony, if different inferences may be drawn therefrom.

### **Summary and Statement of Issues Involved.**

Petitioner asks this Court to issue a writ of certiorari in order that this Court may decide the following question: Did the insured under the facts in this case die "as a result, directly or indirectly, of service, travel or flight in any species of aircraft as a passenger or otherwise?" This question was at issue under the pleadings and was developed by the evidence. It was submitted to and answered in the negative by the jury, the trial court, and the Circuit Court of Appeals for the Seventh Circuit. The facts are somewhat unusual, are not likely to reoccur, and are of the utmost importance to the determination of the question.

Petitioner's statement is inadequate and respondent, therefore, makes the following additional statement.

The life insurance policy sued on was issued by the company in the State of Florida, on October 24th, 1939, to Richard Bull while he was an aviation cadet, United States Naval Reserve (R. 148-153). The signed application contained the following questions and answers:

"2. (a) Occupation. Describe your duties exactly.

(a) Aviation Cadet U. S. Naval Reserve.

(b) Have you changed your occupation within the last five years? If so, what was your last occupation?

(c) Have you any intention of changing your present occupation?

(b) Yes—Student (c) No.

(d) Have you within the past two years engaged in any form of aviation as a passenger or otherwise?

(d) Yes.

(e) Do you propose to do so?

(e) Yes." (R. 148).

Thus, it will appear that at the time of the acceptance of the risk by petitioner, Bull was solely engaged in aviation, and that he intended to continue in that employment. The fact that he intended to remain in the services of the government was also communicated to the company and well known by it for the reason that his other insurance as stated in his application, was United States Government insurance in the sum of \$10,000.00 (R. 149), and he arranged with petitioner to have the premiums paid on instant policy out of his compensation received from the government while in service (R. 149).

In his application he further stated he was subject to orders from the navy department, and might be sent on foreign duty (R. 137).

If the construction of petitioner is to be adopted, *then the only coverage Bull had under this policy was while he was eating his meals and sleeping.* The premium on the policy was \$55.50 per quarter, or a total of \$220.00 annually (R. 5), and it is ridiculous to assume that the parties hereto entered into a contract for a consideration of \$222.00 per year that only afforded *protection on the life of the insured while he was eating and sleeping.* That unreasonable construction was rejected by the jury, the trial court, and the Circuit Court of Appeals.

An endorsement issued on the date of the policy provided that "Death as a result, directly or indirectly, of service, travel or flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed under this policy"

(R. 23). The policy does not contain a "war clause" exempting the company from liability in case of death caused by the military or naval service of insured in time of war.

On February 5, 1942, insured, who was then a Lieutenant, junior grade, in the United States Naval Reserve, was commanding officer of a seaplane engaged in patrol duty in the South Pacific (R. 46, 52). While on a patrol flight Japanese warships were located in a harbor, and the seaplane started to bomb them. The plane was hit by an anti-aircraft fire and by Japanese Zeros. The port motor was shot out and the gas tanks filled with holes. They succeeded in losing the attacking Zeros in the clouds, but gasoline poured into the hull and fumes filled the seaplane. The plane made a forced landing on the water at a point ten or fifteen miles from the scene of the encounter and five hundred to one thousand yards off the island of Amboina, Dutch East Indies. The plane did not crash, but after landing could not have flown again without repairs. The motors were stopped in the normal manner, the anchor thrown out, and the seaplane floated on the water for ten minutes (R. 47, 53, 54, 59, 61, 71). Gasoline continued to escape from the tanks of the seaplane and spread over the surrounding water so that the area was in an explosive condition (R. 54, 70).

Two of the plane's crew, Hargrave and Nelson, with a wounded comrade debarked from the plane in a rubber boat and started for shore (R. 60). Up to this point the insured was uninjured (R. 50, 68, 69). Hargrave testified that insured was inside the plane when he last saw him (R. 61). Nelson testified that the last time he saw insured he was outside the plane on the fuselage inflating a second rubber life boat (R. 48).

At this point a Japanese seaplane of a type entirely different from those previously encountered attacked the disabled plane from a height of twenty to fifty feet firing incendiary and steel capped bullets from its machine guns.

Insured was exposed to this machine gun fire (R. 49). The first attack did not sink the disabled seaplane, and the Japanese plane circled for a second attack. On the second attack Hargrave and Nelson dived under the water for protection. While under the water the witnesses heard an explosion and on returning to the surface the area where the plane had been was in flames and only a tip of a wing was visible (R. 48, 49, 56, 60, 62, 69). The insured was never seen thereafter.

The policy also contained the following incontestability clause: "This policy shall be incontestable after it has been in force during the lifetime of the assured for a period of two years from the date of issue except for non-payment of premiums and except as to provisions and conditions, if any, relating to Total and Permanant Disability and to Double Indemnity" (R. 19). *The incontestability clause does not by its terms except death resulting from aviation.* Insured died more than two years after the policy was issued and in force.

Plaintiff perfected a cross appeal to the Circuit Court of Appeals contending that the trial court erred in its refusal to hold that the incontestability clause in the policy barred the company from asserting the defense of death from aviation (R. 171-173). By stipulation the original appeal and cross appeal were consolidated in one case (R. 199, 200), and the notice of cross appeal and cross errors and statement of points filed by cross appellant are included in the record in this case (R. 171, 172, 173). The Circuit Court of Appeals having found for plaintiff on the original appeal held that the cross appeal need not be sustained (R. 188). For incontestability clause see Record, page 19.

#### **Opinion of the Court Below.**

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 141 F. 2nd 456 and is also set forth in the record beginning Page 183.